Editor's note: 84 I.D. 87; Reconsideration denied by order dated March 15, 1977

PARK CENTER WATER DISTRICT

AND

THE CANON HEIGHTS IRRIGATION AND RESERVOIR COMPANY

IBLA 76-553 Decided February 3, 1977

Appeal from decision of the Colorado State Office, Bureau of Land Management, increasing charge for water from well on public land, Pueblo 057197.

Affirmed.

1. Administrative Procedure: Burden of Proof--Appraisals--Evidence: Presumptions--Water and Water Rights: Generally

   One challenging the accuracy of an appraisal of water based on fair market value must show by substantial evidence the nature of the alleged error; where the appraisal has been conducted in accordance with generally accepted appraisal principles, allegations of error unsupported by evidence will be given little weight.

2. Water and Water Rights: Generally--Water and Water Rights: State Laws

   An attempted adjudication of federal water rights will not be recognized where the state court 1) lacked jurisdiction over

the United States for failure to serve process upon the Attorney General of the United States or his designated representative pursuant to 43 U.S.C. § 666(b) (1970); and 2) lacked jurisdiction over the subject matter for failure of the litigation to conform to the requirements of a general litigation of all water rights pursuant to 43 U.S.C. § 666(a) (1970).

3. Water and Water Rights: Federally Reserved Water Rights --Water and Water Rights: State Laws--Withdrawals and Reservations: Springs and Waterholes

Where a waterhole and the surrounding land were withdrawn pursuant to both an Executive Order and an Act of Congress and reserved exclusively for use by the public before the water had been appropriated by others, the federally reserved water right is superior to and precludes any acquisition of rights to the water by others.

4. Contracts: Generally--Estoppel--Water and Water Rights: Generally

A lessee of the water from a well owned by the federal government, who agrees that his use of the water will not be used as a basis for obtaining a permanent water right and who nevertheless proceeds to try to obtain a water right in state court based on that use, will be estopped from asserting any resulting decree of the state court for any purpose.

APPEARANCES: William V. Crossman, Esq., and Larry Dean Allen, Esq., Canon City, Colorado, for appellants; Harold J. Baer, Jr., Esq., Office of the Solicitor, United States Department of the Interior, Denver, Colorado, for appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Park Center Water District and The Canon Heights Irrigation and Reservoir Company appeal from the February 24, 1976, decision of the Colorado State Office, Bureau of Land Management (BLM), increasing the charges for water withdrawn from a well owned by the United States from 2 cents per thousand gallons to 6 cents per thousand gallons. 1/ Appellants argue that the BLM's decision is arbitrary and capricious for two reasons. First, they assert that there is simply no justification for an increase in costs; and, second, they have obtained from the State of Colorado a decree granting them the right to the use of the water.

[1] The BLM decided to raise the rate for this water due to a reappraisal of its value. Section 2 of the lease provides in part that

> * * * The water fees and charges set forth above will be reviewed by the lessor at five year intervals, commencing with the effective date of this instrument [July 1, 1971], to determine

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1/ The actual difference in charges between the two rates is not as drastic as it might seem. The appellants consumed 24,302,366 gallons of water in the most recent year of the lease. At 2 cents per 1,000 gallons the charge would be $486.05. However, the lease in § 2(B)2 provides for a minimum charge of $1,000 per year. At 6 cents per 1,000 gallons the charge would be $1,458.14. Therefore, in practical terms, the difference is between $1,000 per year and $1,458.14 per year, a difference of $458.14.

> the fair market value of this lease and water charges to be made for the next successive five year period. [Emphasis added.]

In accordance with that provision, the BLM conducted a survey of the existing market for well water in this area of Colorado. The conclusion of the appraiser, Jerry J. Rohr, was that the fair market value of the water is 6 cents per 1,000 gallons. The study appears to have been conducted with due regard to professional standards, and the conclusions are well supported by the facts marshalled by Rohr. Where the fair market value of the land or water has been determined in accordance with generally accepted appraisal procedures the conclusions of the appraisal will not be disturbed in the absence of a showing of error. See George D. Jackson, 20 IBLA 253, 257 (1975); Eugene G. Roguszka, 15 IBLA 1, 11 (1974). As appellants have failed to point to any specific error in the report, the conclusions of the appraisal are accepted as correct.

[2] Appellants' alternative basis for appeal apparently rests on a decree granted them by a Colorado court giving them the right to put the water to beneficial use. 2/ This, assert the appellants, gives them the right to continue to receive the water without paying

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2/ No such decree is included in the record before us, nor have appellants specifically indentified any such decree. They allege only that they have "Applied for and obtained" a right to the water pursuant to Colorado law. However, the record does contain a published legal notice which indicates that appellants are referring to case No. W-1499 in the District Court of Colorado in and for Water Division No. 2.

increased charges. 3/ In support of this assertion they cite but one case, Colorado River Water Conservation Dist. v. United States, 96 S. Ct. 1236 (1976). Apparently the case is cited for the proposition that water rights of the United States may be adjudicated in state court proceedings.

State courts may adjudicate water rights of the United States under certain conditions set forth in the "McCarran Act," 43 U.S.C. § 666 (1970). First, the state must serve notice of the proceeding on the Attorney General of the United States or his designated representative. 43 U.S.C. § 666(b) (1970); see United States v. Cappaert, 508 F.2d 313, 321 (9th Cir. 1974), aff'd 96 S. Ct. 2062 (1976). The Solicitor asserts that neither the Attorney General nor his designated representative has ever been served with process in this case, and there is no contrary allegation or evidence. For that reason the state court never had jurisdiction over the United States.

Second, the provisions of the McCarran Act provide a limited waiver of sovereign immunity only where the state court proceeding involves a general, area-wide adjudication of the water rights of all parties, not simply where one water user wishes to challenge the United States' right to the water. Cappaert v. United States,

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3/ Why the appellants believe they are obliged to pay anything at all, in view of their asserted belief in the validity of the court's decree, is not explained.

96 S. Ct. 2062, 2073 (1976); Dugan v. Rank, 372 U.S. 609 (1963); United States v. Hennen, 300 F. Supp. 256, 261 (D. Nev. 1968). This adjudication was not the general adjudication contemplated by the McCarran Act, and, therefore, the Colorado court had neither jurisdiction nor authority to affect the rights of the United States.

[3] Moreover, it is clear that the right to the use of the water is and always has been vested in the United States. The water in this well was struck by a lessee of the United States who was exploring for oil and gas. Section 40 of the Mineral Leasing Act, 30 U.S.C. § 229a (1970), was enacted in 1934 and gave the authority to the Secretary of the Interior to purchase the casing of the well and to lease the well to the public. This was done. 4/ The legislation also provided that the land on which the well was located would be withdrawn as a waterhole. 30 U.S.C. § 229a(a) (1970).

All waterholes on public lands and the surrounding acreage were withdrawn by Executive Order No. 107 of April 17, 1926,

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4/ By letter "L" PJA, dated April 4, 1936, the Commissioner of the General Land Office reported to the Secretary that the casing in this well had been purchased and the well conditioned as a water well by the Geological Survey, and he recommended that the water be offered for lease. On April 18, 1936, the First Assistant Secretary authorized the leasing of this water in accordance with the Act of June 16, 1934, 48 Stat. 977. The first lease of this water issued effective on January 1, 1937.

30 CFR 241.5, n. 1, pursuant to § 10 of the Act of December 29, 1916, 39 Stat. 865, 43 U.S.C. § 300 (1970); 43 CFR 2311; the Act of August 24, 1912, 37 Stat. 497 and the Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. §§ 141, 142 (1970). Therefore, it is clear that the well and the land surrounding it have been reserved from disposition since before the first lease was issued. Jack A. Medd, 60 I.D. 83, 98-100 (1947). In fact, the notice of the first offer to lease in 1936 contains the statement of the withdrawal of the land pursuant to Executive Order No. 107, as does every subsequent lease up to and including the present one.

> The federal government was not obligated to secure permission of and from the State Engineer's Office * * * before it could make use of the underground or percolating waters developed in its own wells * * * upon its reserved lands * * *, nor was the State * * * entitled to enjoin the federal government from the use of such waters because its representatives failed to comply with statutory procedural law and regulation in force covering the field of appropriation and use of water.

State of Nev. ex rel. Shamberger v. U.S., 165 F. Supp. 600, 601 (D. Nev. 1958).

See also Gunvald Landheim, 52 L.D. 554 (1929).

The Supreme Court stated in the Cappaert case that

> This court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves

> appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams. Colorado River Water Conservation District v. United States, 424 U.S. 800 p. , 96 S.Ct. 1236, p. 1240, 47 L.Ed.2d 483 (1976); United States v. District Court for Eagle County, 401 U.S. 520, 522-523, 91 S.Ct. 998, 1000-1001, 28 L.Ed.2d 278, 280-281 (1971); Arizona v. California, 373 U.S. 546, 601, 83 S.Ct. 1468, 1498, 10 L.Ed.2d 542, 578 (1963); FPC v. Oregon, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215 (1955); United States v. Powers, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 330 (1939); Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908).

96 S. Ct. at 2069-70.

The Supreme Court also held in that case that the doctrine of implied reservation applied to both underground and surface water. 96 S. Ct. at 2072. Consequently, it is clear that this well and its water are withdrawn from any other disposition, including the attempted disposition under state law. The attempt by the state court to determine and dispose of the rights of the United States to the water is simply without effect.

[4] Finally, it should be noted that the appellants are estopped by contract from asserting any sort of permanent water right against the United States. In every lease since the first one beginning on January 1, 1937, lessees have agreed that

> The furnishing of water hereunder shall under no circumstances become the basis of a permanent water right.

Lease, Section 1.

That provision is part of the most recent lease, a lease effective on July 1, 1971, for a period of 20 years. Appellants acted in total disregard of the terms of their lease in seeking a permanent water right. Having nevertheless obtained a decree in their favor, a decree invalid for numerous other reasons, appellants are estopped from asserting it as a basis for relief. Woodard v. General Motors Corp., 298 F.2d 121, 129 (5th Cir.), cert. denied, 369 U.S. 887 (1962); Gress v. Grees, 209 S.W. 2d 1003 (Tex. Civ. App. 1948).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Edward W. Stuebing
Administrative Judge

We concur:

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Douglas E. Henriques
Administrative Judge

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Joseph W. Goss
Administrative Judge